# Wong Teck Choy v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N–05–8 OF 2003
GOPAL SRI RAM, RICHARD MALANJUM AND NIK HASHIM JJCA
13 JUNE 2005

*Criminal Law — Murder — Private defence — Appeal — Whether deceased first attacked appellant with knife — Inconsistencies in witnesses' testimony — Which version to be believed — Whether trial judge errored in believing one version and not the other*

The appellant was charged for the murder of the deceased. The appellant had raised two defences. First, that of private defence. Second, that of excess of private defence to bring his case within the exception 2 to s 300 of the Penal Code so as to reduce his crime to one of culpable homicide not amounting to murder. According to PW10, the deceased's sister-in-law, the deceased was passive and unarmed and it was the appellant who drew his handgun and shot the deceased. Another witness, PW12, a friend of the appellant said that he saw the deceased attacking the appellant. He also said that the deceased had something in his hand. The appellant claimed that he was confronted and attacked with a knife by the deceased. The appellant was convicted of the offence of murder and sentenced to death. He appealed.

**Held**, dismissing the appeal:

(1) Where private defence is put forward in answer to a criminal charge, there is a duty upon the prosecution to show beyond reasonable doubt that the accused did not act in self-defence. Consequently, if an accused raises a reasonable doubt about the existence of the right of private defence he is entitled to be acquitted of the charge. One of the cardinal principles governing the right of private defence is that the exercise of that defence should not exceed what is reasonably necessary to avert the assailant's attack (see para 6).

(2) The learned judge had undertaken sufficient judicial appreciation of PW10's evidence and was very much aware of the apparent conflict between this witness and PW12. He gave reasons for the choice he made and this court was unable to detect any appealable error in his reasoning. It was clear that the judge took proper advantage of the fact that he had seen and heard the witnesses, particularly PW10 when making his assessment of this and other material witnesses. His conclusions based on the evidence of PW10 were beyond criticism (see para 8).

(3) The learned judge was also very much alive to all points of conflict between the evidence of PW10 and other prosecution witnesses. It was well within the province of the learned judge to treat the inconsistencies between PW10 and other witnesses as minor discrepancies (see para 9).

(4) Only one critical question of fact presented itself before the learned judge for determination. That question was whether the deceased attacked the appellant with a knife. The learned judge answered that question in the negative. He further held that the appellant had failed to raise a reasonable doubt on this issue. He arrived at his conclusion after a careful analysis of the facts and undertaking a probative measurement of all the evidence led before him. His direction unto himself was beyond criticism (see para 13).

[**Bahasa Malaysia summary**

Perayu telah disabit untuk kesalahan membunuh si mati. Perayu telah membangkitkan dua pembelaan. Pertama, pembelaan persendirian. Kedua, kelebihan pembelaan persendirian untuk membawa kes ini bawah pengecualian 2 s 300 Kanun Keseksaan supaya dapat mengurangkan kesalahannya kepada membunuh tanpa niat. Menurut PW10, adik ipar si mati, si mati pasif dan tidak bersenjata dan perayu yang mengeluarkan pistol dan menembak simati. Seorang lagi saksi, PW12, kawan perayu, menyatakan bahawa beliau nampak si mati menyerang perayu. Beliau juga mengatakan bahawa si mati memegang sesuatu dalam tangannya. Perayu mengatakan bahawa dia di hadapi dan diserang dengan sebilah pisau oleh si mati. Perayu dihukum untuk kesalahan membunuh dan di hukum mati. Beliau merayu.

**Diputuskan**, menolak rayuan itu:

(1) Di mana pembelaan persendirian dibangkit untuk menjawab kepada satu sabitan jenayah, pendakwa raya mempunyai tanggungjawab untuk menunjukkan tanpa keraguan yang munasabah bahawa tertuduh tidak berkelakuan sedemikian untuk menyelamatkan diri sendiri. Sekiranya tertuduh mewujudkan keraguan yang munasabah mengenai kewujudan hak pembelaan persendirian, beliau berhak di bebaskan daripada sabitan itu. Salah satu daripada prinsip terpenting yang mengawal hak pembelaan persendirian menyatakan bahawa dalam membela diri, seseorang tidak patut melakukan lebih daripada apa yang perlu untuk mengelak serangan penyerang (lihat perenggan 6).

(2) Hakim yang bijaksana telah menggunakan penumpuan penghakiman yang cukup ke atas keterangan PW10 dan prihatin terhadap konflik yang jelas di antara saksi ini dan PW12. Beliau memberi sebab-sebab kepada pilihan yang dibuat olehnya dan mahkamah ini tidak dapat mengesan apa-apa kesalahan yang boleh dirayu dalam sebab-sebab itu. Adalah jelas bahawa hakim telah mengambil penelitian yang betul atas fakta bahawa beliau telah melihat dan mendengar saksi-saksi itu, terutamanya PW10, apabila membuat penelitian beliau mengenai saksi ini dan saksi-saksi material yang lain. Kesimpulannya berdasarkan keterangan PW10 tidak boleh dikritik (lihat perenggan 8).

(3) Hakim yang bijaksana juga amat sedar kepada semua ciri-ciri konflik antara keterangan PW10 dan saksi-saksi pendakwa yang lain. Adalah dalam kuasa hakim yang bijaksana untuk menganggap apa yang tidak konsisten di antara PW10 dan saksi-saksi yang lain sebagai percanggahan yang kecil (lihat perenggan 9).

(4) Hanya satu soalan fakta yang penting untuk diputuskan oleh hakim yang bijaksana. Soalan ini adalah sama ada si mati menyerang perayu dengan sebilah pisau. Hakim yang bijaksana menjawab soalan itu dengan negatif. Beliau seterusnya memutuskan bahawa perayu gagal mewujudkan keraguan yang munasabah atas isu ini. Beliau membuat kesimpulan selepas analisis yang teliti dan mengambil langkah yang probatif ke atas kesemua keterangan di hadapan beliau. Arahannya tidak boleh dikritik (lihat perenggan 13).]

**Notes**

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1078–1085.

**Cases referred to**

*Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 (refd)
*Jayasena v R* [1970] AC 618 (refd)
*Lee Thian Beng v PP* [1972] 1 MLJ 248 (refd)
*PP v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 159 (refd)
*PP v Foong Chee Chee Cheong* [1970] 1 MLJ 97 (refd)
*Ya bin Daud v PP* [1997] 4 MLJ 322 (refd)
*Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 (refd)

**Legislation referred to**

Evidence Act 1950 s 105
Penal Code s 300, exception 2

**Appeal from**: Criminal Trial N 45–3 of 2001 (High Court, Seremban)

*Muhammad Shafee Abdullah (Frida Krishnan, Amy Chong Boon Chin and Goi Soon Seng with him) (Shafee & Co) for the appellant.*
*Kamaruzaman bin Abdul Jalil (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.*

**Gopal Sri Ram JCA** (delivering judgment of the court):

**[1]** The appellant was convicted by the High Court at Seremban of the offence of murder and sentenced to death. The facts giving rise to the conviction are as follows.

**[2]** On 13 January 2001 the appellant had gone to the Goal Pub at Taman Thivy Jaya, Seremban. He parked his car and went in. He did not consume any alcohol while there. At about midnight, he emerged to find that his car had been blocked by a Honda motorcar. The appellant began to curse the driver of the Honda in Cantonese. He admits he used foul language. At about that time, the driver of the Honda came along. He is the deceased. According to PW10 who is now the deceased's sister-in-law, the deceased was passive and it was the appellant who drew his handgun and shot the deceased. PW10 went on to testify that the deceased was unarmed and stood about 14 feet away from the appellant when the appellant discharged his firearm. Another witness, PW12, a friend of the appellant said that he saw the deceased attacking the appellant. He also said that the deceased had something in his hand. After the incident, the deceased was taken away to the hospital where he was pronounced dead.

**[3]** According to the appellant, shortly after he had cursed the driver of the Honda motorcar, he was confronted by the deceased. An altercation took place in which he was the victim and the deceased the attacker. He claims the deceased to have wielded a knife. Fearing for his life the appellant shouted a warning at the deceased in Cantonese that he (the appellant) was carrying a gun. The deceased having nevertheless advanced further, the appellant shot the deceased. The appellant therefore squarely raised two defences. First, that of private defence. Second, that of excess of private defence to bring his case within the second Exception to s 300 of the Penal Code so as to reduce his crime to one of culpable homicide not amounting to murder.

**[4]** On the facts as established there does not appear to be any dispute that the prosecution had established all the ingredients of the offence of murder. What the appellant did was to say that notwithstanding all the ingredients having been established, he was entitled to be legally excused for the crime because he acted in private defence or alternatively if he acted in excess of that defence, his case came within exception 2 to s 300. The burden therefore fell on the appellant to establish either defence on a balance of probabilities. This is because of s 105 of the Evidence Act 1950. See *Jayasena v R* [1970] AC 618. The nature of the onus on an accused was considered by Nik Hashim J in *Ya bin Daud v Public Prosecutor* [1997] 4 MLJ 322 as follows:

> The right of private defence is one of the general exceptions set out in Chapter IV of the Code, proof of which by virtue of s 105 of the Evidence Act 1950 rests on the accused, and the burden is not a heavy one. Spenser Wilkinson J in *Raman v PP* [1948–49] MLJ Supp 146 said:
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> > In criminal matters, whilst it is true that s 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence.'

> Having considered the provisions in the Code on the right of private defence, and its principles in the cases aforesaid, the court has to decide whether the appellant was acting under a reasonable apprehension that death or grievous hurt would be caused to him by the assailants. Whether the apprehension was reasonable or not is a question of fact. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances are to be taken into account (Ratanlal: *The Law of Crimes* (22nd Ed) p 220).

**[5]** We respectfully agree with this statement of the law.

**[6]** It follows that where private defence is put forward in answer to a criminal charge, there is a duty upon the prosecution to show beyond reasonable doubt that the accused did not act in self-defence. Consequently, if an accused raises a reasonable doubt about the existence of the right of private defence he is entitled to be acquitted of the charge: *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645. One of the cardinal principles governing the right of private defence is that the exercise of that defence should not exceed what is reasonably necessary to avert the assailant's attack. See *Lee Thian Beng v PP* [1972] 1 MLJ 248, per Ong Hock Sim FJ.

**[7]** Returning to the present case, it is crystal clear from the evidence of PW10 that the deceased was unarmed and standing some 14 feet away from the appellant. The learned judge accepted her evidence and this acceptance formed part of the frontal assault by the appellant upon the findings made. Itis true that PW10 had already married the deceased's brother at the time she gave evidence and was therefore an interested witness. But as Gill J (later CJ, Malaya) said in *Public Prosecutor v Foong Chee Chee Cheong* [1970] 1 MLJ 97:

> There is certainly no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances (*Balasingham v Public Prosecutor* [1959] MLJ 193).

**[8]** Now, we have read and re-read the learned judge's judgment and find that he has undertaken a sufficient judicial appreciation of PW10's evidence. He was very much aware of the apparent conflict between this witness and PW12. The latter had testified that there had been an attack by the deceased upon the appellant at close quarters. But the learned trial judge chose to accept the evidence of PW10 on material points. He gave reasons for the choice he made and we are really unable to detect any appealable error in his reasoning. He saw and heard the witnesses and was certainly in a better position than we are with the cold print of the record before us. There is no material from which we can confidently say that he failed to seize upon and to utilise the audio-visual advantage he enjoyed. Indeed, when his judgment is read as a whole, it is clear that he took proper advantage of the fact that he had seen and heard the witnesses, particularly PW10 when making his assessment of this and other material witnesses. His conclusions based on the evidence of PW10 are beyond criticism and we therefore reject the appellant's submission

that the learned judge misdirected himself in appreciating this witness' evidence. So far as this part of the case is concerned, we need do no more than to remind ourselves of what Raja Azlan Shah FJ (as he then was) said in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 159:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

**[9]** In the present case, the learned judge was very much alive to all points of conflict between the evidence of PW10 and other prosecution witnesses. He however classified them as minor discrepancies. Having been taken through the record of appeal with a fine-tooth comb by learned counsel for the appellant we are in agreement with the learned judge upon the issue of PW10's credibility. It was well within the province of the learned judge to treat the inconsistencies between PW10 and other witnesses as minor discrepancies. As Shaikh Daud JCA said in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 where a similar complaint was advanced:

> There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

**[10]** A further point made by the appellant is that the evidence of PW10 is falsified by the evidence of the clinical pathologist PW9. We do not agree. Asthe learned deputy pointed out, PW9 quite frankly admitted in evidence that she is not knowledgeable about matters of forensic science. By contrast, the chemist (PW5) and the forensic expert (PW6) called by the prosecution were the true experts upon the subject of forensic science. The evidence of these two witnesses coupled with the surrounding circumstances tends to

support the evidence of PW10 in material particulars. We therefore find no merit in this complaint of the appellant.

**[11]** The appellant also made complaint that the learned judge did not give any or any sufficient consideration to the importance of the finding of the knife at the scene of the incident when considering the plea of private defence. With respect we do not agree. It is clear from the judgment of the learned judge that he was very much alive to the fact that the knife had been found. But he gave that fact no weight because of the place where it was found and the distance from the knife to the place where the deceased was shot. He also took into account the fact that apart from the appellant no witness testified that the deceased was armed with a knife. All PW12 was able to say is that he saw something in the deceased's hand. The learned judge gave no weight to this part of PW12's evidence. He was entitled to do so. As we said earlier, he had seen and heard this witness and was obviously unimpressed with this part of his evidence. After careful consideration we are really unable to any valid ground to criticise the judge for the way in which he dealt with this part of the case.

**[12]** Another ground of complaint raised by the appellant is the failure of the learned judge to take into account the speed at which the relatives of the deceased threw away the shoes he wore on the night in question. It was argued for the appellant that this fact, taken together with the deceased's occupation as a re-possessor of cars justified the drawing of an inference that the knife at the scene came from the deceased's shoes. But there was no evidence from any witness to show the special significance of the deceased's foot ware. There was certainly no cross-examination directed by appellant's counsel in the court below to demonstrate the special features, if any of the deceased's shoes. In the absence of any such material on the point, learned counsel's argument is nothing more than pure conjecture which is as good as writ on water.

**[13]** In this case only one critical question of fact presented itself before the learned judge for determination. That question is whether the deceased attacked the appellant with a knife. Learned counsel for the appellant conceded that this was indeed the only issue of any importance in this case. The learned judge answered that question in the negative. He further held that the appellant had failed to raise a reasonable doubt on this issue. He arrived at his conclusion after a careful analysis of the facts and undertaking a probative measurement of all the evidence led before him. In our judgment, his direction unto himself is beyond criticism.

**[14]** There were several other minor points raised by the appellant which do not amount to anything at all. At the end of the day, the issue whether the plea of private defence was fairly open to the appellant in the circumstances of the case is a pure question of fact well within the province of the trial judge.

He came to the conclusion that the facts and evidence before him did not admit of the defence. He also considered exception 2 to s 300 and concluded that it was also not available to the appellant. These are correct directions based on the findings of fact that he made after an analysis of the material before him. In a case such as the present it is quite out of place for us to intervene when there are settled principles that clearly say that we ought not to.

**[15]** Having satisfied ourselves that there is no misdirection on the part of the learned judge and that the conviction of the appellant is entirely safe in the circumstances of this case, we have no alternative but to dismiss this appeal. The conviction and sentence are affirmed.

*Appeal dismissed.*

Reported by Loo Lai Mee